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SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1086

KENNETH W. DAY, ET AL., *Appellants*

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and SOUTHERN PACIFIC COMPANY, *Appellees*

On Appeal from the United States District Court for the Southern District of California

Motion to Affirm of Southern Pacific Company

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Appellee, Southern Pacific Company, moves that the judgment of the district court be affirmed, pursuant to Rule 16(1)(c) of the Rules of this Court.

STATEMENT

This direct appeal by appellants is from a judgment of a three-judge district court, which after hearing on August 23, 1965, denied the complaint of appellants to enjoin and

set aside orders of the Interstate Commerce Commission approving the merger of Southern Pacific Company and its wholly-owned subsidiary, Pacific Electric Railway Company. The merger was consummated on August 13, 1965, following denial by U. S. District Judge Charles H. Carr, after hearing, of appellants' application for a temporary restraining order and motion for a preliminary injunction.

Southern Pacific's and Pacific Electric's application for authority to merge their properties and franchises under section 5(2) of the Interstate Commerce Act (49 U.S.C. § 5(2)) was granted by the Interstate Commerce Commission in *Southern Pacific Co. — Merger — Pacific Electric Railway Co.*, F.D. 23011, on September 23, 1964, without an oral, public hearing. The Commission's decision stated (J.S. 14a)[1]:

> "Accordingly, and in view of the lack of any opposition to the merger by public agencies, shippers, or other carriers we find that a hearing is not necessary in the public interest."

The Railway Labor Executives' Association (hereinafter referred to as RLEA), which is an appellant here, never formally protested or intervened in the Commission proceeding, as required by the Commission's General Rules of Practice, although it did correspond with the Commission. By its letter of March 4, 1964 (plaintiffs' brief (R. 345)[2], App. 1) it requested denial of the merger application and notice of hearing. On April 13, 1964, counsel for the RLEA wrote the Director of the Bureau of Finance of the Commission (plaintiffs' brief (R.345), App. 4) that:

> "Both of the applicants are financially strong railroad carriers and, therefore, it would not be consistent

1. "J.S." refers to Jurisdictional Statement.
2. "R"—Refers to Transcript of Record in this court.

with the public interest to grant the proposed application unless some public need is evidenced by the applicants or, at least, there is evidence which demonstrates that the merger would result in no harm to shippers or employees of the applicants."

This letter also stated that the "Oklahoma" conditions for the protection of employees, which had been suggested by the Commission, were not satisfactory. The RLEA pointed out that some adverse effects on employees might be delayed, "making the so-called 'New Orleans' conditions applicable." The RLEA stated that it "believes 'New Orleans' to be insufficient to meet the requirements of section 5(2)(f) because of the insufficient fringe benefit protection provided thereby." RLEA requested a hearing on the application "to determine its consistency with the public interest; the precise effect of approval upon shippers and employees; and to determine the conditions which should be imposed to meet the statutory minimum and to protect effectively the employees." (Underlining in original.)

The Commission's Report and Order of September 23, 1964 completely disposed of these contentions of RLEA (J.S. 14a):

> "The Railway Labor Executives' Association (Association) has requested that the merger proceeding be set for hearing alleging that the merger would not be consistent with the public interest because both of the carriers involved are financially strong; many of the carriers' lines are parallel in Los Angeles, San Bernardino and Orange Counties, Calif., providing shippers with a choice of two carriers and this competition would be removed upon merger; and consolidation of certain train operations and clerical forces would cause economic injury to the carriers' employees. However, the financial strength of carriers involved in an application under section 5(2) of the act is not necessarily a bar to approval. Compare *Detroit, T. & I. R.*

Co. Control, supra, page 489, and *Norfolk & Western Ry. Co. and New York, Chicago & St. Louis R. Co., Merger, Etc.,*—I.C.C.—, decided June 24,. 1964. Inasmuch as the Pacific Electric has served principally as a feeder line for the Southern Pacific since its stock ownership was acquired by the latter carrier in 1911, it does not appear that any significant amount of competition exists between the two carriers. See *Pacific Electric Ry. Co.,* 215 I.C.C. 414, 418. See, also *Interstate Commerce Commission v. Baltimore & O. R. Co.,* 152 I.C.C. 721, 736, and 160 I.C.C. 785, 791-792. Accordingly, and in view of the lack of any opposition to the merger by public agencies, shippers, or other carriers we find that a hearing is not necessary in the public interest."

On June 24, 1965, in denying RLEA's petition for reconsideration and request for hearing, the Commission made clear that the prescribed conditions provided the fringe benefit protection desired by RLEA, as it ordered (J.S. 28a):

"*It appearing,* That the material matters set forth in the petition have been considered by Division 3, and discussed in its report; that the decision is based on adequate findings supported by the record; that there has been presented no error of fact or law with respect to the matters complained of by the petitioner; and that no showing has been made warranting reconsideration and hearing:

It is ordered, That said petition, including request for hearing, be, and it is hereby, denied.

It is further ordered, That the authorization granted herein will be subject to the same conditions for the protection of railway employees who may be adversely affected as were imposed in *Southern Ry. Co.—Control—Central of Georgia Ry. Co.,* 317 I.C.C. 557, as supplemented and clarified in 317 I.C.C. 729 and 320

I.C.C. 377, including sections 4, 5, and 9 of the Washington Job Protection Agreement, see *Atchison, T. & S.F. Ry. Co. Merger*, 324 I.C.C. 254, 261 . . ."

Although the appellants have never made any showing that the merger of Southern Pacific and Pacific Electric is not meritorious, and have never indicated in what respect the protective conditions prescribed by the Commission are not adequate, they claim that the Commission erred in authorizing the merger and imposing the protective conditions without a hearing.

Appellants claim they are entitled to a hearing, notwithstanding that the Commission is expressly authorized by section 5(2)(b) of the Interstate Commerce Act (49 U.S.C. § 5(2)(b)) to deny a hearing if it finds, as it did here, that a hearing is not necessary in the public interest, and despite the fact the prescribed conditions for the protection of employees are identical to the most liberal ever ordered by the Commission.

ARGUMENT

I. The district court correctly concluded there was no violation of appellants' statutory or constitutional rights.

The Commission's denial of a hearing is expressly authorized by the 1949 amendment (63 Stat. 485) to section 5(2)(b). There has been no showing that the Commission abused its discretion to deny a hearing, as appellants have not shown they have been injured in any way, and consequently there has been no violation of appellants' constitutional rights.

It is clear that Congress intended to grant the Interstate Commerce Commission the power to decide without a hearing the kind of case presented here, i.e., a parent-

subsidiary merger not substantially affecting the rights of the public.

In 1949, section 5(2)(b), which had required a public hearing in all cases where carriers by railroad were involved, was amended (63 Stat. 485) to permit the Commission to dispense with a public hearing if it "determines that a public hearing is not necessary in the public interest."

The 1949 hearings reflect the congressional intent. The Interstate Commerce Commission had supported such an amendment since 1947 (Annual Report of the Interstate Commerce Commission, 1947, Recommendation No. 3, p. 147). The transcript of hearings of May 3, 1949, before a subcommittee of the Committee on Interstate and Foreign Commerce of the House of Representatives, on H. R. 1710, contains a letter of explanation to the Committee from the Commission which states (R.252, App. 4, p. 60 thereof):

> "Cases involving railroads are not invariably of such importance that a public hearing is necessary or desirable. Where such cases are of minor importance, this mandatory requirement causes unnecessary expense and delay. We believe that the Commission should have the same discretion as to holding a hearing in railroad cases as it has in those involving motor or water carriers. Section 3 of the bill would give it this discretion."

I.C.C. Commissioner Splawn testified at the hearings (R.252, App. 4, pp. 63-64 thereof) concerning the proposed amendment that a detailed application must be filed in section 5(2) cases, "from which the Commission can determine whether or not there is a prima facie case." He also testified the Commission had discretion whether to hold hearings in abandonment cases under section 1, paragraphs (18) to (21), of the Interstate Commerce Act.

Both the Senate Committee on Interstate and Foreign Commerce Report No. 82 on S.256, dated February 25, 1949 (R.252, App. 5, p. 65 thereof), and the Committee on Interstate and Foreign Commerce of the House of Representatives Report No. 971 on S.256, dated July 6, 1949 (R.252, App. 6, p. 68 thereof) adopt the Commission's explanation of the amendment to allow the Commission to dispense with a public hearing, and state that there was no serious objection to the bill and that it was "non-controversial."

The courts have upheld the Commission's authority to deny a public hearing where the Commission determines a public hearing is not necessary in the public interest:

O.C. Wiley & Sons v. United States, 85 F. Supp. 542 (W.D. Va. 1949), *aff'd,* 338 U.S. 902 (1949);

Walker v. United States, 208 F.Supp. 388 (W.D. Tex. 1962), *aff'd,* 372 U.S. 526 (involving proceedings under §§ 5 and 20a of the Interstate Commerce Act).

The Commission on numerous occasions has decided similar cases without a hearing.

Southern Pacific Co., et al. Merger, etc., 290 I.C.C. 818 (1955) [not printed in full];

Southern Pacific Co.—Merger—Central Pacific Ry. Co., etc., 307 I.C.C. 806 (1959) [not printed in full];

Southern Pacific Co.—Merger, etc.—Texas & New Orleans RR. Co., 312 I.C.C. 598, 599 (1961).

In *Allegheny Corp. Notes,* 307 I.C.C. 736, 741 (1959), the Commission stated succinctly why a public hearing should be denied where, as here, there is no controverted issue of fact:

> "As stated, intervener has requested that applicant's chairman of the board and president be required to support the application with the testimony under oath, subject to cross-examination, *but intervener described no evidence which he would produce if a hearing was assigned and alleged no facts which would justify such assignment.* In our opinion no hearing is necessary to enable us to determine our decision upon the application. Moreover, in view of the delay which would be occasioned by assignment of the application for hearing, and the probability that such delay would result in increasing the cost of the proposed financing and possibly endanger its successful completion prior to maturity of the outstanding notes, we are of the view that assignment of the matter for hearing is not justified merely to afford intervener an opportunity to cross-examine applicant's officers. Accordingly, the intevener's request for an oral hearing is denied." (Emphasis supplied.)

Appellants have never raised any issue of fact which could be resolved if a hearing were held, nor has it ever pointed to any defect in the Southern-Central of Georgia protective conditions, or suggested more satisfactory conditions. As pointed out by the district court in its opinion (J.S. 8a), the constitutionality of a statute or order cannot be attacked unless a party shows that he has been injured. *Ashwander v. Valley Authority,* 297 U.S. 288 (1936); *Arizona v. California,* 283 U.S. 423 (1931). Without such a showing, a hearing would be an idle act, nothing but "a hearing for the sake of a hearing."

II. Section 5(2)(f) does not require a hearing in order for the Commission to prescribe conditions for the protection of employees.

There is nothing in section 5(2)(f) of the Interstate Commerce Act (49 U.S.C. § 5(2)(f)) that requires the Com-

mission to hold a hearing in order for it to determine what protective conditions should be prescribed. If Congress had intended to require hearings, it would have so stated. By the terms of section 5(2)(f) the Commission is required, in its order of approval, to include terms and conditions providing employees with four years' protection against "being in a worse position with respect to their employment," and it is clear that compensation, not a "job freeze", is required by this section. (*Brotherhood of Maintenance of Way Employees v. United States,* 366 U.S. 169, 175-78 (1961)). Prescription of the Southern-Central of Georgia conditions in this case by the Commission not only fully complied with the requirements of section 5(2)(f), but they were, as will be discussed *infra,* actually more liberal than were required.

A hearing could not possibly serve any purpose except delay, as the same protective conditions have been imposed in many merger and control cases, large and small, including:

Southern Ry. Co.—Control—Central of Georgia Ry. Co., 317 I.C.C. 557 (1962), 317 I.C.C. 729 (1963), 320 I.C.C. 377 (1964);

Chesapeake & O. Ry. Co.—Control—Baltimore & O. R. Co., 317 I.C.C. 261, 288 (1962);

Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122, 199-204 (1963);

Detroit, T. & I. R. Co.—Control—Ann Arbor R. Co., 317 I.C.C. 619, 625 (1962);

Cambria & I. R. Co. Construction and Acquisition, 320 I.C.C. 43, 51 (1963);

Georgia-Pacific Corp.—Control, 320 I.C.C. 115, 120 (1963);

Boston & Maine Corp. Merger, 320 I.C.C. 290, 298 (1963).

If RLEA disputed the adequacy of these conditions, it could have specified in what respects additional protection was desired, but it never did so, either in its informal correspondence with the Commission, on petition for reconsideration before the Commission, or in this action.

Appellants' contention that the Commission had no facts before it with respect to the impact of the merger upon employees (J.S. 4) is not correct, as the Southern Pacific-Pacific Electric application for authority to merge, which was part of the record,[3] stated (p. 21):

> "The effect of the proposed merger upon employees is not readily ascertainable in advance of consolidation, except that the ultimate result will involve the reallocation of work, with resulting force adjustments, including displacement or transfer of employees to whom the provisions of section 5(2)(f) of the Interstate Commerce Act will be applicable."

Clearly there was adequate evidence in the record to sustain all the Commission's findings, including its finding that "a hearing is not necessary in the public interest." (J.S. 14a). The appellants have carefully avoided bringing this record before the court. Appellants therefore are in no position to question the adequacy of the evidence to support the Commission's findings. *Mississippi Valley Barge Line Co. v. United States,* 292 U.S. 282, 285-86

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3. The Commission also had before it the record in Docket No. 33872, a complaint proceeding, which was consolidated for decision with the merger proceeding. The Commission recognized (J.S. 17a-18a) that "Southern Pacific's foremost problem at Los Angeles was relieving the congestion at its Los Angeles (Taylor) Yard which processed traffic destined to certain points in the area as well as that traffic passing through Los Angeles", and then found (J.S. 18a) "The merger, which will provide single corporate ownership, will afford more efficient utilization of facilities, equipment, and manpower as well as contributing to a more economical system operation as delineated above."

(1934); Rule 1.19 of the Commission's General Rules of Practice (49 C.F.R. § 1.19), which provides that the pleadings are evidence and constitute part of the record; Reporter's Transcript of Proceedings, August 23, 1965, pp. 29, 35 and 37.

Appellants have implied that the Commission might have had more information if a hearing had been held, but it is well established that the Commission is not required to determine the precise effect of a particular transaction upon employees before it may give its authorization and prescribe protective conditions. *Chicago, B.&Q.RR. Co. Abandonment,* 257 I.C.C. 700, 703 (1944). It makes no difference "whether 100 or 1000 employees are affected." *Brotherhood of Maintenance of Way Employees v. United States,* 366 U.S. 169, 178 (1961).

The Southern-Central of Georgia conditions prescribed by the Commission are even broader than the conditions which the Commission was required to impose by section 5(2)(f). Instead of the four-year protective period required by the statute, the conditions actually imposed by the Commission in this case protect affected employees against loss of pay and fringe benefits for a maximum of five years, as they incorporate key provisions of the Washington Job Protection Agreement (J.S. 28a). The combined effect of the Southern-Central of Georgia conditions and the Washington Job Protection Agreement is to provide comprehensive protection against loss of pay and fringe benefits for five years through displacement allowances, dismissal allowances, payment of moving expenses and payment of losses on the sale of a home. These conditions also require the posting of 90-day notices by the carrier of changes in collective bargaining agreements, require collective bargaining with reference thereto, and require compulsory

arbitration if the parties do not agree. *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 317 I.C.C. 557, 563-69, and Appendix II thereto.

III. The Commission's decisions and orders of September 23, 1964 and June 24, 1965 satisfy fully the requirements of section 5(2)(c).

Section 5(2)(c) of the Interstate Commerce Act (49 U.S.C. § 5(2)(c)) provides:

> "In passing upon any proposed transaction . . . the Commission shall *give weight* to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected." (Emphasis supplied.)

Appellants contend that the Commission did not "give weight" to "the interest of the carrier employees affected." As stated above appellants cannot attack the findings in the absence of the record (*Mississippi Valley Barge Line Co. v. United States, supra*). Moreover, it is clear that the Commission did "give weight" to the interest of the employees. The Commission's decision of September 23, 1964 considered RLEA's contentions in its correspondence regarding the effect of the merger on the public interest, and answered each of the contentions of the RLEA (J.S. 14a), although the RLEA had not filed a formal protest or intervened. The Commission expressly mentioned the RLEA's allegation that certain protective conditions imposed in the past gave insufficient fringe benefit protection (J.S. 14a-15a), and it then found (J.S. 15a):

"However, in our opinion adequate protection will be afforded by the conditions prescribed in *Southern Ry Co.—Control—Central of Georgia Ry. Co.*, 317 I.C.C. 557, as supplemented and clarified in 317 I.C.C. 729 and 320 I.C.C. 377. Therefore, the conditions prescribed in the latter case will be imposed by reference in our order for the protection of railway employees."

The Commission also found, in its order of June 24, 1965 (J.S. 27a-28a) that the prescribed conditions included sections 4, 5 and 9 of the Washington Job Protection Agreement.

All that is required by section 5(2)(c) is that the Commission "give weight" to the interest of the employees, and there is nothing in this section which requires the Commission to hold an oral hearing. As we have noted in connection with section 5(2)(f); if Congress had intended that an oral hearing be held in every case it could easily have inserted appropriate language in section 5(2)(c), but it expressly provided to the contrary when it enacted the 1949 amendment to section 5(2)(b) which permitted the Commission to dispense with a public hearing if it is not necessary in the public interest. There is no conflict between the Commission's decision herein and *Fort Worth & D.C. Ry. Co. Lease,* 247 I.C.C. 119 (1941), as argued by appellants (J.S. 18). That case held that the Commission must "give weight" to the matters mentioned in section 5(2)(c), and that it may then deny an application filed under section 5(2). As we have pointed out, it is obvious that the Commission did "give weight" to the considerations set forth in section 5(2)(c), and no more specific findings are necessary. The ultimate finding for approval of a transaction under section 5(2) is whether it will be "consistent with the public interest". *Southern Ry. Co.—*

Control—Central of Georgia Ry. Co., 317 I.C.C. 557, 569, and this finding was made by the Commission (J.S. 24a).

Appellants' contention that the Commission must give more specific weight to the interest of affected employees is also answered by *Brotherhood of Maintenance of Way Employees v. United States*, 221 F.Supp. 19, 29 (E.D. Mich. S.D. (1963)), *aff'd*, 375 U.S. 216, in which it was held that the Commission had given adequate consideration to the interest of employees. The Court said (p.29) that mergers

> ". . . must inevitably have an impact upon the railroad employees. . . . We cannot say that the conditions imposed by the Commission do not adequately protect the rights of the employees in this situation."

IV. Section 17(11) of the Interstate Commerce Act does not require a hearing.

Section 17(11)(49 U.S.C. § 17(11)) provides that employee representatives "may intervene and be heard," but it says nothing about a public hearing. RLEA was "heard" as the Commission considered all the arguments made in the RLEA's letters regarding the merits of the merger and the nature of the protective conditions that should be prescribed. The RLEA was "heard" further when the Commission gave specific consideration to the RLEA's petition for reconsideration, and issued its order of June 24, 1965, which explained that the conditions for the protection of employees included sections 4, 5 and 9 of the Washington Job Protection Agreement (J.S. 28a). See *Riss & Co. v. United States*, 117 F.Supp. 296, 301, 304 (W.D. Mo. 1952), *aff'd*, 346 U.S. 895 (1953), (hearing requirement satisfied by consideration of pleadings). Moreover, the RLEA technically did not exercise its right to "intervene", in accordance with the Commission's General Rules of Practice.

Finally, section 17(11) was enacted as part of the Transportation Act of 1940 and it must be deemed to have been modified by the more specific 1949 amendment to section 5(2)(b), which authorized the Commission to dispense with a public hearing if it "determines that a public hearing is not necessary in the public interest."

CONCLUSION

This appeal does not present any substantial question concerning the constitutional or statutory rights of railroad employees. At no time have appellants indicated that any injury resulted to them from the prescription of the broad protective conditions provided by the Commission in its orders and decisions herein, and it must be concluded that in the circumstances here present a hearing would be an idle act on the part of the Commission, and that its findings find adequate support in the record. The judgment of the district court should be affirmed.

Respectfully submitted,

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STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO—SS.

I, HERBERT A. WATERMAN, one of the attorneys for appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15th day of April, 1966, I served copies of the foregoing document on counsel of record for all parties herein.

HERBERT A. WATERMAN

Subscribed and sworn to before me
this 15th day of April, 1966.

H. G. BUNN, JR.,
Notary Public
In and For the City and County of
San Francisco, State of California.
My Commission Expires June 25, 1967

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